DE 03-064

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Special Contract with Fraser N.H. LLC

Order Approving Petition

O R D E R N O. 24,151

March 31, 2003

I. PROCEDURAL HISTORY

On March 7, 2003, Public Service Company of New Hampshire (PSNH) filed a petition with the New Hampshire Public Utilities Commission (Commission) seeking the Commission's approval pursuant to RSA 378:18 and 378:18-a of a special contract with Fraser N.H. LLC (Fraser). As noted in the pre-filed testimony submitted with the petition, Fraser is the new owner of the paper mill in Gorham and the pulp mill in Berlin that were shut down in 2001 when their prior owner sought bankruptcy protection. The proposed special contract, NHPUC-142, could become effective as early as April 7, 2003[1], assuming Commission approval.

The Commission entered an Order of Notice on March 12, 2003. The Order of Notice invited persons with an interest in the proceeding to submit written comments on or before March 21, 2003. PSNH was required to publish the Order of Notice in the

[1] Article 7 of the Special Contract provides that its effective date "shall be the latest of April 7, 2003, the date Fraser commences preparations for the operation of the pulp mill, or the date upon which the Commission orders that (the) Agreement becomes effective."

Union Leader of Manchester and the *Berlin Daily Sun*; this was accomplished on or before the deadline of March 15, 2003 with appropriate affidavits duly filed.

The Office of Consumer Advocate (OCA) submitted written comments supporting the proposed special contract on March 11, 2003. Subsequent to the Order of Notice, the Commission received comments favorable to the proposal from the Town of Gorham (on its own behalf and on behalf of the City of Berlin as well as the Androscoggin Valley Economic Recovery Corporation), the City of Berlin, the Coos County Board of Commissioners, the New Hampshire Timberland Owners' Association (TOA), State Rep. John H. Thomas and State Rep. Roy Maxfield (the chair and co-chair, respectively, of the Committee on Science, Technology and Energy of the New Hampshire House of Representatives), State Senator John Gallus, State Rep. Edgar Mears, Executive Councilor Raymond S. Burton, Commissioner George M. Bald of the New Hampshire Department of Resources and Economic Development, Local 75 of the Paper, Allied-Industrial and the Chemical & Energy Workers International Union (representing 700 mill workers in the Berlin-Gorham area), State Rep. David S. Woodward, and Pierre Lessard, a summer resident of Berlin. Fraser N.H. LLC submitted a petition to intervene on March 21, 2003.[2]

[2] Inasmuch as the Commission has not treated PSNH's petition as a contested case within the meaning of RSA 541-A:31, RSA 541-A:32 petitions are not necessary in order to comment on the PSNH petition or otherwise to preserve

There were no comments submitted in opposition to the proposed special contract. However, on March 20, 2003 the Commission received a written request from Wausau Papers of New Hampshire, Inc. (Wausau) requesting an extension to March 24, 2003 of the time for it to submit written comments.[3] On March 24, 2003, Wausau submitted its comments in the form of a pleading entitled "Motion in Support of Special Contract NHPUC-142 and for Associated Rate Relief," contending that the proposed special contract would have anti-competitive effects that the Commission should cure by requiring PSNH to make the same special contract terms available to Wausau's paper mill and distribution center in Groveton. On the same date, PSNH submitted a letter that expressed skepticism about the merits of Wausau's petition and urged the Commission not to delay its consideration of the Fraser special contract in order consider Wausau's request. According to PSNH, a separate docket is the appropriate vehicle for the Commission to consider Wausau's request. Councilor Burton submitted a letter on March 21, 2003 indicating his support for the Wausau proposal. On March 25, 2003, Wausau submitted a letter in reply to PSNH's rebuttal of Wausau's initial filing. Fraser responded to Wausau's filing on March 26, 2003. On March 27, 2003, Wausau submitted a pleading captioned "Motion for

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any rights. Accordingly, we need not act on Fraser's intervention request.

[3] The Commission subsequently granted this request, by secretarial letter issued on March 25, 2003.

Expedited Order with Conditions." The Commission orally deliberated the case at its public meeting of March 27, 2003.

II. BACKGROUND SUMMARY OF THE PROPOSED SPECIAL CONTRACT

The previous owner of the Berlin and Gorham mills sought bankruptcy protection in September 2001, causing operations at both facilities to cease. According to the pre-filed testimony submitted by PSNH, this led to the loss of 760 jobs at the mills themselves as well as others that were dependent on the mill operation in some way. In May of 2002, affiliates of the Brascan Corporation purchased both the mills and their related hydro-electric generation facilities. The filing avers that four of the five paper machines in Gorham have restarted but that the pulp facility in Berlin and the fifth Gorham paper machine remain idle. According to officials of Fraser, the company is installing a new 25 megawatt cogeneration facility at the Berlin mill which will, when completed and combined with the hydro-electric capacity, render both mills completely energy self-sufficient with the exception of back-up power. At that time, Fraser expects to have 28.7 megawatts of hydro-electric capacity available to it, 25 megawatts from the new cogeneration facility and 9.5 megawatts from existing steam turbines.

The proposed special contract is designed to cover the period leading up to the completion of the new cogeneration facility at the Berlin mill.[4] By its terms, the special contract would remain in effect for 12 months or until the completion of the cogeneration facility, whichever is sooner. If the cogeneration facility remains uncompleted at the end of the 12 months, there is a provision for a maximum of six 30-day contract extensions. Thus, the special contract has a maximum duration of approximately 18 months.

Currently, Fraser purchases electricity from PSNH under PSNH's Large General Delivery Service Rate LG. The special contract would vary the tariff associated with Rate LG as follows:

> Delivery of electricity to Fraser at PSNH's East Side Substation would be billed as though Fraser were taking service at one rather than two points of delivery or two separate accounts.
>
> Fraser would receive a discount on the delivery demand charge with respect to all incremental demand above 1,300 kilowatts. Rate LG provides for a demand charge of $4.86; Fraser would be billed $1.00.
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> The maximum demand provision of the Rate LG tariff would be modified such that Fraser's billing demand would be based on kilowatt demand as opposed to kilovolt-ampere demand, and would be based on demands during the current billing cycle only. Normally, a "demand ratchet" applies to a Rate LG customer, such that demand charges are based on demands during the current billing cycle and the previous 11 cycles.

According to PSNH's pre-filed testimony, over the past several months Fraser's on-peak kilowatt demand has averaged

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[4] By its terms, the Special Contract would be effective on the latest of (1) April 7, 2003, the date Fraser "commences preparations for the operation of

6,200 kilowatts. However, PSNH believes it is appropriate to base the demand value in the special contract on 1,300 kilowatts rather than 6,200 kilowatts, thus applying the discount to all power drawn by Fraser above 1300 kilowatts. Recent drought conditions in northern New Hampshire significantly reduced the output of the hydro-electric facilities owned by Fraser's affiliate, thereby necessitating that Fraser purchase more electricity from PSNH than it would under normal conditions. According to PSNH, the output of these facilities from June through December of 2002 was, on average, 24 percent lower than the ten-year average output, corresponding to a decrease of 4,900 kilowatts. PSNH avers that it expects the output of the hydro-electric facilities over the next 12 months to match the ten-year average more closely such that Fraser will be able to meet loads above 1300 kilowatts from its own hydro facilities. Therefore, according to PSNH, absent the special contract Fraser's maximum on-peak monthly demand on PSNH would be 1,300 kilowatts.

According to the pre-filed testimony of James Wagner, Corporate Manager of Product Development and Process Improvements for Fraser Papers, Inc. (sole member and manager of Fraser N.H. LLC), "[w]e have reviewed the likely costs of purchasing energy from PSNH at the tariffed rates and have concluded that we cannot economically start the pulp mill and the rates prescribed in the

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the pulp mill" or on such other effective date as the Commission orders.

tariff." Mr. Wagner goes on to testify that the proposed special contract "will enable us to proceed to restart the pulp mill and the fifth paper machine" in Gorham.

Stephen R. Hall, PSNH's rate and regulatory services manager, addressed the issue of benefits to PSNH customers in his pre-filed testimony. According to Mr. Hall, PSNH estimates the cost of providing service to Fraser to be in the "mid- to high six cent range," meaning $0.06 per kilowatt-hour, including the cost of capacity and ancillary services. Mr. Hall notes that, under the proposed special contract, PSNH would receive approximately 7.7 cents per kilowatt-hour from Fraser (in the form of Transition Service revenue priced at 4.67 cents per kilowatt-hour and stranded cost recovery charges of approximately 3 cents), with the difference between revenue and costs credited to stranded costs that would otherwise be recoverable from PSNH customers. According to Mr. Hall, assuming that Fraser's incremental load is 10 megawatts, this would amount to a reduction of nearly $800,000 in PSNH's stranded costs recoverable from other consumers.[5]

Mr. Hall also notes that PSNH would receive a benefit under the proposed special contract, in the form of incremental delivery revenue at $1.00 per kilowatt-month. Based on a 10

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[5] PSNH's all-in cost of 6.7 cents per kilowatt-hour was based on a wholesale price of $60 per megawatt-hour. To the extent that the actual market price of

wholesale power varies from $60, the stranded cost reduction would vary accordingly.

megawatt load, this amounts to $120,000 in revenue. Mr. Hall also points to statewide benefits, in the form of 200 new jobs created at the Fraser mills as well as additional jobs for loggers who provide wood products to supply the pulping operation.

PSNH avers that, upon the expiration of the special contract, Fraser plans to receive backup delivery service from PSNH. According to PSNH, this service will be supplied to Fraser under standard tariff pricing, with billing reverting to the two delivery points presently applicable.

III. COMMENTS IN SUPPORT OF THE SPECIAL CONTRACT

All persons who submitted comments indicated support of the proposed special contract. Most of the comments stressed the regional economic benefits of the estimated 150 to 200 jobs likely to be added by Fraser. The TOA noted that the presently idle Berlin pulp mill has traditionally represented half of the state's market for low-grade wood, which the TOA estimates to be approximately 1.2 million tons per year.

IV. WAUSAU PAPERS OF NEW HAMPSHIRE, INC.

In its written filing submitted on March 24, 2003, Wausau averred that "the benefits provided by the [proposed Fraser special] contract are consistent with the public interest and important for the continued economic recovery of the North Country." However, Wausau urged the Commission to use the occasion of approving the Fraser special contract to order PSNH to offer the same special contract terms to Wausau. Indeed, in its reply comments of March 25, 2003, Wausau took the position that the Commission "cannot" approve the Fraser special contract "until the Commission remedies the unfair anti-competitive advantages that the Contract affords to Fraser." In its March 27, 2003 motion for expedited decision, Wausau averred that the Commission not only has a statutory obligation, but a constitutional duty "to remedy the unfair and anti-competitive effects of the contract" on Wausau.

In support of its position, Wausau relies on (1) its argument that the Fraser special contract would not be in the public interest as required by RSA 378:18 unless the same terms are offered to Wausau, (2) RSA 378:10, which precludes a public utility from making or giving "any undue or unreasonable preference or advantage to any person or corporation," (3) the guarantee of equal treatment before the law as secured by Part 1, Articles 2 and 3 of the New Hampshire Constitution, and (4) Part II, Article 83 of the New Hampshire Constitution, which describes "[f]ree and fair competition in the trades and industries" as "an inherent and essential right of the people."

In its filing, Wausau avers that it operates a paper mill and distribution center in Groveton that was, at one time, co-owned by the same company (James River Corporation) that owned the Fraser facilities in Gorham and Berlin. Wausau points out that since it purchased the Groveton Mill in 1993, it has operated the facility continuously and, in 2002, invested $13 million to construct a combined cycle natural gas-fired electric generation facility to provide energy to the Groveton mill. According to Wausau, when it has excess capacity it can sell up to 4.99 megawatts to PSNH at the regional market clearing price.

Wausau avers that its cogeneration facilities meet its energy needs in most circumstances, but that it must still rely on PSNH for backup service under Rate B. According to Wausau, because Fraser has not recently installed generation capacity it is able to take advantage of a “grandfathering provision” in PSNH’s tariffs and obtain both backup and regular service under Rate LG as opposed to Rate B.

In its rebuttal comments, PSNH indicates that it is “not opposed to working with Wausau or other customers that present the unique circumstances that underlie the Fraser situation.” However, PSNH characterizes as “doubtful” whether Wausau can demonstrate facts that justify a special contract. According to PSNH, Wausau has incorrectly suggested that the special contract with Fraser would provide a discount from the tariffed rate for back-up service.

Wausau, in reply, contends that the special contract with Fraser would receive a discount related to back-up service by virtue of the contract allowing PSNH to bill Fraser as if Fraser were taking service at a single delivery point. Wausau further questions PSNH's suggestion that the proposed discount applies only to new load, given that the contract applies to demand in excess of 1,300 kilowatts whereas Fraser's maximum on-peak demand has averaged 6,200 kilowatts in the past several months.

V. STAFF'S RECOMMENDATIONS

On March 27, 2003, the Commission's Electric Division recommended approval of the proposed special contract, and further recommended that the Commission defer consideration of the Wausau filing and open a separate docket for that purpose. Staff based its analysis on the filings, comments submitted by PSNH, Fraser, Wausau and others, as well as responses provided by PSNH and Fraser to certain discovery requests.

In the view of Staff, approval of the special contract would aid Fraser in more fully utilizing its facilities, including the reopening of the Berlin pulp mill earlier than would otherwise occur. According to Staff, this would be of particular benefit to Fraser because it would allow the company to purchase and process pulp within New Hampshire and thus no longer rely on an uncertain regional market for pulp wood.

Staff also notes that PSNH would receive an increase in delivery service revenues associated with the incremental load from Fraser. Staff concludes that PSNH customers would benefit because the special contract would reduce stranded costs that would otherwise be recoverable from all PSNH customers. On the question of public benefits, Staff notes that the unemployment rate for the Berlin labor market is currently 7.1 percent. Thus, according to Staff, the addition of at least 150 and possibly 200 jobs to the local economy will trigger significant regional benefits.

Through discovery, Staff confirmed that the cogeneration project at the Fraser mills is moving forward. In response to a Staff discovery request, Fraser noted that it has received the required air pollution control permits, local subdivision, special exception and site plan approvals, and has obtained a conditional building permit from the City of Berlin pending review of the building design associated with the new cogeneration facility.

Staff suggested that PSNH work with Fraser to explore the feasibility of participating in an interruptible load program. According to Staff, this could help minimize the exposure of PSNH and its customers to the high market prices that occur on a limited basis at times of high demand for electric power in the New England region. At such peak demand times, the cost to PSNH of acquiring power to serve Fraser could exceed revenues, thus drastically altering the economics of the special contract at those times from the standpoint of PSNH and its customers.

With respect to Wausau, Staff’s concern centers on the lack of an adequate record on which the Commission could consider Wausau’s contention. In Staff’s view, the opening of a separate docket to consider the Wausau request would allow for such a record to be developed.

VI. COMMISSION ANALYSIS

Pursuant to RSA 378:18, a utility may enter into a special contract with one of its customers, and depart thereby from its published and approved tariffs, upon a determination by the Commission that “special circumstances exist which render such departure from the general schedules just and consistent with the public interest.” Further, as to electric utilities, “new special contracts designed to attract load shall be available to an electric utility customer only if the contract is approved pursuant to RSA 378:18 and the commission determines that no tariffed rate is sufficient to attract the load.” RSA 378:18-a,III.

We have no difficulty in making the required determinations. Indeed, none of the many written comments submitted in this proceeding after public notice have suggested any other outcome. We agree with PSNH and Staff’s analysis of the contract's benefits to Fraser, PSNH, PSNH customers and the public.

The petition makes clear that Fraser is making a substantial investment in additional cogeneration capacity in order to make the full operation of the Berlin and Gorham mills economical, and that the sole purpose of the proposed special contract is to hasten the date of full operation. In other words, this is a stopgap measure, after which Fraser will again revert to obtaining any necessary service from PSNH under applicable tariffed rates. An official of Fraser has testified that, absent the provisions of the special contract, the pulp mill and the fifth paper machine in Gorham would remain idle pending the completion of the cogeneration facilities. It is uncontroverted that returning the mills to full operation would add at least 150 jobs to the local economy and create multiplier benefits in the North Country generally. Moreover, the special contract would offset certain stranded costs that would be otherwise recoverable from all PSNH customers.

It is clear that no tariffed rate is sufficient to attract the load represented by the presently idled mill capacity at Fraser and that discounts of the size included in the contract are necessary in order to achieve the speedy mill reopening. We find that special circumstances exist that justify the proposed departure from the PSNH tariffs of general application. Those special circumstances include (1) the fact that approval and implementation of the special contract are a pre-requisite to Fraser's reopening the idled pulp mill in Berlin as well as the fifth paper machine at its Gorham facility prior to the completion of new cogeneration facilities, (2) the "stop-gap" nature of the agreement – i.e., the fact that it is not a permanent or long-term arrangement but merely an agreement covering the construction period associated with the cogeneration project, and (3) the particular importance to the economy of the Berlin-Gorham area of returning the Fraser mill facilities to as full an operation as soon as possible.

We share Staff's concern about the possibility that, at certain times of high demand, the cost to PSNH of acquiring power to serve the load associated with the special contract could obviate the benefits of the contract to PSNH and its customers. We therefore direct PSNH and Fraser to pursue Fraser's participation in an interruptible service program and any other applicable conservation or load management programs offered by PSNH and/or ISO-New England. We further expect PSNH to manage its supply portfolio, through forward contracts or hedges, for example, so as to assure the benefits of the incremental load to itself and customers other than Fraser.

The only remaining question is Wausau's contention that we would be violating statutory and constitutional protections against unfair competitive advantage by not simultaneously offering Wausau the same special contract terms granted to Fraser. In our view, the Wausau filing raises significant issues that must be addressed, but we disagree with Wausau's suggestion that we must resolve these issues prior to approving the instant petition.

Although Wausau contends that we cannot approve the Fraser special contract without first ruling on the issues raised in the Wausau filing, Wausau offers no support for this view and we are not aware of any. RSA 378:18 contemplates that the Commission will deal with special contracts on a case-by-case basis. To the extent the public interest determination with respect to the Fraser contract should also trigger an evaluation of whether the contract creates harm to competitors, we do not agree that such evaluation must occur contemporaneously with the approval of the Fraser contract. However, even if we were able to conclude at this time that the Fraser contract has anti-competitive effects on Wausau that warrant a remedy, we believe that the public interest would not necessarily compel us to deny the Fraser contract. As Wausau states, "...adverse competitive consequences of the special contract on Wausau do not require rejection of the contract." *Wausau Papers of New Hampshire,* Motion dated March 24, 2003, p. 15. Rather, the more appropriate course of action insofar as the public interest is concerned is to examine whether we should also mitigate any competitive harm if such is proven to exist.

Because we see the approval of the Fraser contract as separable from the issue of whether Wausau is entitled to a mitigation of any anti-competitive harm created by the contract, we have opened a separate docket to consider that issue. Assuming *arguendo* that applicable legal standards would require Wausau to receive the same rate discounts offered by PSNH to Fraser, including the same effective date, there is no reason why an appropriate reconciliation mechanism to provide Wausau retroactive relief could not be effectuated. The fact that Wausau has formally made such a request for rate relief, and duly notified PSNH, would obviate any concerns with retroactive ratemaking.

We deem it particularly necessary to defer consideration of Wausau’s request given the factual and legal uncertainty that surrounds it. A key aspect of Wausau’s argument is that its New Hampshire-produced products compete with those of Fraser. We are unable to accept Wausau’s assertion to that effect without further inquiry. Clearly, a full factual record on the question of the similarity of these customers’ circumstances needs to be developed. Such a record would not simply explore the extent to which they are in the same markets, but also the extent to which their facing different PSNH rates over the next year to 18 months would be anti-competitive under the law. Requiring consideration is the interplay between the undesirability of anti-competitive contracts and the Commission's power to make reasonable distinctions between customers based on their costs of service and other factors (including the presence or absence of factors justifying special contracts under RSA 378:18).

Accordingly, we have opened a new docket (DE 03-078) to consider Wausau's request that it receive the same special contract terms afforded to Fraser, including the same effective date. We are treating the Wausau filing and its appended affidavit as a petition and pre-filed testimony to that effect, and the Order of Notice entered by the Commission on March 27, 2003 includes an expedited schedule in an effort to address Wausau's contention that any competitive harms it would improperly suffer by virtue of the Fraser special contract could make themselves felt within one to two months.

VII. MOTION FOR CONFIDENTIAL TREATMENT

On March 21, 2003, Fraser submitted a motion for confidential treatment of certain portions of data responses submitted to Staff on that date. In its motion, Fraser avers that it is engaged in a "highly competitive" business, and that information regarding the specifics of Fraser's operations and its cost of production are competitively sensitive, highly confidential and proprietary.

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. *See* RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "*and* whether disclosure would constitute an invasion of privacy." *Id*. at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id*. at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id*. at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2) reference to statutory or common law authority favoring confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information "would likely create a competitive disadvantage for the petitioner." *Id.* at (c).

We find that Fraser has made the requisite showing with respect to those portions of its responses to Staff's discovery requests that Fraser deems confidential. Fraser is not a regulated utility and, as it notes, it is a participant in the highly competitive paper industry. We agree with Fraser that information about its processes, the economics of those processes and its business strategies could, if revealed, cause significant competitive harm to the company. On the other end of the scale, there is little harm to the public in withholding this information because it illuminates only the benefits of the special contract to Fraser, as opposed to the other benefits (to the public, PSNH ratepayers and PSNH) that form the essential basis of our approval of the proposed special contract. For this reason, application of the requisite balancing test leads us to grant Fraser's motion.

Based upon the foregoing, it is hereby

ORDERED, that PSNH Special Contract No. NHPUC 142 with Fraser N.H. LLC is APPROVED; and it is

FURTHER ORDERED, that the Executive Director and Secretary shall open a new docket to consider the March 24, 2003 filing of Wausau Papers of New Hampshire, Inc., treating the filing as a petition by Wausau for an order directing PSNH to enter into a special contract with Wausau with an effective date of April 7, 2003; and it is

FURTHER ORDERED, that the pending motion of Fraser N.H. LLC for confidential treatment of documents is GRANTED; and it is

FURTHER ORDERED, that PSNH notify the Commission in writing of each 30-day extension of the contract; and it is

FURTHER ORDERED, that PSNH notify the Commission in writing of the date Fraser's cogeneration facility becomes operational and the date the contract terminates; and it is

FURTHER ORDERED, that the determination as to confidential treatment of documents is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any member of the public to reconsider such determination in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this thirty-first day of March, 2003.

Thomas B. Getz	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary